

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD CARPENTER	:	CIVIL ACTION
	:	
v.	:	
	:	
MOBILE DREDGING & PUMPING CO.,	:	
Defendant/Third-Party	:	
Plaintiff	:	
	:	
v.	:	
	:	
COUNTY OF MONMOUTH,	:	
Third-Party Defendant	:	NO. 99-5386

MEMORANDUM AND ORDER

Fullam, Sr. J.

March , 2004

Plaintiff sued his employer, Mobile Dredging & Pumping Co., for damages sustained in an on-the-job accident. Mobile then filed a third-party complaint against the County of Monmouth New Jersey, and plaintiff cross-claimed against the County.

The defendant Mobile was hired by the County to deepen the waters surrounding a marina owned by the County. Plaintiff was a member of the crew of the dredge which was sent to the site on March 30, 1999, to begin the project. At about 3:00 a.m. on March 31, 1999, plaintiff and a coworker received a telephone call at the motel where they were staying, reporting that the dredge appeared to be sinking. When they arrived, they discovered that the dredge was indeed beginning to sink, and determined that it would be necessary to pump water out of the

dredge, which was partially submerged and leaning away from the bulkhead of the dock.

Not far away in the marina, the County of Monmouth had placed a pile of boat-racks. As plaintiff was proceeding on foot to obtain tools needed to commence the pumping operation, a pile of boat-racks fell over, striking plaintiff and causing severe injuries.

Plaintiff's claims against his employer, Mobile Dredging & Pumping Co., were predicated upon the employer's non-delegable duty to provide a safe place for plaintiff to work. His claims against Monmouth County were based upon the alleged negligence of the County in having improperly stacked the boat-racks. After an eight-day trial, the jury returned a verdict in favor of the plaintiff and against the defendant Mobile Dredging & Pumping Co., but exonerated the County of Monmouth. Plaintiff has filed a motion for judgment as a matter of law against the County, or for a new trial against that entity. The defendant Mobile has filed a motion for judgment as a matter of law or for a new trial.

I. Claims Against the County of Monmouth

In answers to special interrogatories, the jury found that the pile of boat-racks constituted a dangerous condition on the County's property, and was a proximate cause of plaintiff's injuries; that the County violated OSHA standards; and, that

County employees were negligent in the manner in which they stacked the boat-rack parts.

There was ample evidence to support the jury's findings. This would have resulted in a verdict in favor of plaintiff and against the County of Monmouth but for the fact that the jury further found that the County's actions and inactions were not "palpably unreasonable." That finding precluded imposition of liability upon the County, under the New Jersey Tort Claims Act, N.J.S.A. § 59:4-2(b).

Plaintiff now contends that it was error to submit that issue to the jury, because there was no evidence that the stacking of the boat-racks involved a high-level issue of discretion on the part of the County officials. This argument reflects a misapprehension of the pertinent statutory provisions. Section 59:2-3(c) of the Statute provides:

"A public entity is not liable for the exercise of discretion in determining whether to seek or whether to provide the resources necessary for the purchase of equipment, deconstruction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services."

Thus, in New Jersey a municipality enjoys absolute immunity against liability for the policy decisions of high officials. But § 59:4-2 of the Statute provides as follows:

"A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous

condition created a reasonably foreseeable risk of the kind of injury which was incurred and that ... (b) a public entity had actual or constructive notice of the dangerous condition ... a sufficient time prior to the injury to have taken measures to protect against the dangerous condition [but]

nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable."

N.J.S.A. § 59:4-2

Plaintiff is correct in asserting that, on the evidence at trial, the County did not enjoy absolute immunity for policy-type decisions, but it is nevertheless clear that its negligence could not warrant imposition of liability unless the plaintiff established that its actions were "palpably unreasonable." See Waldorf v. Shuta, 896 F.2d 723 (3rd Cir. 1990).

Plaintiff does not argue that the jury's finding on this subject was not warranted by the evidence. Plaintiff's motion for judgment against the County of Monmouth will therefore be denied.

II. The Post-Trial Motions of Mobile Dredging & Pumping Co.

It is firmly established that a vessel-owner has a non-delegable duty to provide its employees with a safe place to work even when they are required to go on premises of a third party, and that this responsibility requires inspections of the work area in order to discover any potential dangers. See Shenker v.

Baltimore & Ohio R.R., 374 U.S. 1 (1963). The defendant's argument, as I understand it, is that these principles are not applicable to the facts of the present case, since the defendant did not specifically order plaintiff to work in the area where the boat-racks were piled and therefore had no reason to inspect the premises to ascertain whether there were any dangerous conditions present. There can be no doubt, however, that it was necessary for plaintiff to be where he was in order to attend to the sinking barge, and that his injuries were incurred in the course of his employment by the defendant barge-owner. Moreover, there was testimony from a former supervisor employed by the defendant, one Frank Talmo, that he did indeed perform job safety inspections each time he visited the field crew at the marina, and that he was not aware of any unsafe conditions. It was for the jury to decide whether or not the defendant should have discovered the danger posed by the stacked boat-racks. I do not believe there is any basis for disturbing the jury's findings.

Defendant makes the further argument that the Court's charge on causation was inadequate. Defendant does not point to any erroneous language in the charge, but may perhaps be referring to a discussion between the Court and counsel, early in the trial, reflecting some uncertainty over the difference between the standard for submitting a Jones-Act case to the jury ("negligence, however slight") and the proper contents of the

jury charge itself. I have read and reread the Court's charge, and find no basis for the argument now advanced. The jury interrogatories dealt in terms of proximate cause, and that concept was correctly defined for the jury in the course of the charge. Defendant's motion for a new trial must therefore be denied.

Alternatively, defendant contends that, since the jury assigned 60% of the negligence to the County of Monmouth and 10% to plaintiff, and only 30% to Mobile Dredging, Mobile Dredging should only be liable for 30% of the verdict because, under New Jersey law, a joint tortfeasor whose negligence is less than 60% of the total, may only be required to pay its proportionate share of the verdict. N.J. Stat. § 2A:15-5.3 (2003). Unfortunately for the defendant, however, the New Jersey statute has no pertinence to this case, which is governed by the F.E.L.A., 45 U.S.C. § 51 *et seq.* Under the federal statute, joint tortfeasors are liable both individually and jointly; there is no apportionment based upon relative fault. Norfolk & Western Railway Co. v. Freeman Ayers, 123 S. Ct. 1210 (2003).

For all of the foregoing reasons, the respective post-trial motions of all parties will be denied.

An Order follows.

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	:	
COUNTY OF MONMOUTH,	:	
Third-Party Defendant	:	NO. 99-5386

ORDER

AND NOW, this day of March 2004, IT IS ORDERED:

1. Plaintiff's motion for judgment as a matter of law and/or for a new trial against the defendant County of Monmouth is DENIED.
2. The post-trial motion of the defendant Mobile Dredging & Pumping Co. is DENIED.
3. The Order entered on June 23, 2003, is modified to reflect that judgment is entered on the jury verdict in favor of the plaintiff Richard Carpenter and against the defendant Mobile Dredging & Pumping Co. in the sum of \$2,220,651.00.

John P. Fullam, Sr. J.

